IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 146

ABEX CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

Petitioner, Abex Corporation, has been ordered by the Federal Trade Commission, in a proceeding under Section 7 of the Clayton Act, 15 U.S.C. § 18, to refrain for a period of ten years from acquiring the stock or assets of any corporation engaged in the production of sintered metal friction materials. Petitioner has presented to this Court the question whether

the Federal Trade Commission has power to prohibit future acquisitions as a remedy for Section 7 violations (see Pet. 2, 10-14). The identical question has also been presented to this Court in another case (*The Seeburg Corporation* v. *FTC*, No. 509, O. T. 1970, petition for certiorari filed August 7, 1970), underscoring the importance of the issue in the context of the Commission's current Section 7 enforcement practices. See also, *National Tea Co.*, 1967-70 CCH Trans. Binder ¶ 19,266 (FTC, June 1, 1970), where the Commission refused to modify a ban on future acquisitions to permit acquisitions of firms as to which bankruptcy proceedings had been initiated.

In upholding the Commission's power to ban future acquisitions in *Seeburg*, the Sixth Circuit relied solely upon its earlier decision in the instant case. See 425 F. 2d 124, 129. To date, no response has been filed to Seeburg's petition for certiorari. The Solicitor General, on September 4, 1970, requested an extension of time, which, we understand, has been granted, stating that—

> [t]he petition [in *Seeburg*] . . . challenges the Commission's exercise of powers ancillary to a divestiture order to bar further acquisitions for ten years. The latter issue is also presented by the pending petition for certiorari in *Abex Corp.* v. *Federal Trade Commission*, O. T. 1970, No. 146.

(1) In reply to Abex's contention that Section 11 of the Clayton Act, 15 U.S.C. § 21, does not empower the Commission to enjoin future acquisitions, respondent relies on prior holdings of this Court that "'in the absence of compelling evidence that such was Congress' intention * * *, [the courts may not] pro-

hibit administrative action imperative for the achievement of the agency's ultimate purposes'" (Br. in Opp. 6). These holdings are not applicable to the instant case, however, for two critical reasons. First, as is plain from the wording and legislative history of the statute, Congress' intention in enacting Section 11 of the Clayton Act was to limit the Federal Trade Commission to divestiture orders in merger cases; and for half a century Section 11 was construed to accord with that intention (Pet. 7-8, 10-11).

Secondly, respondent does not, and cannot, show that power to ban future acquisitions is "imperative for the achievement of the agency's ultimate purposes." Indeed, all of the cases cited on this point by respondent involved violations of Section 2 of the Clayton Act or Section 5 of the Federal Trade Commission Act (see Br. in Opp. 6). Not a single Section 7 case is cited. The omission is critical, for the remedial imperatives differ significantly in Section 2 and Section 5 cases on the one hand, and in Section 7 cases on the other. In redressing violations of the former statutory provisions, the Commission is generally concerned with acts of the kind that are performed over and over again in the usual course of the violator's business (*e.g.*, sales). Therefore, if the agency's orders in those cases were limited to the specific facts before it, they could easily be evaded by minor variations in technique, necessitating repetitive litigation in order to obtain effective relief.

Section 7 cases are different. An acquisition of stock or assets, unlike the practices usually challenged under Section 5 of the Federal Trade Commission Act or Section 2 of the Clayton Act, is not part of the normal, everyday business of the acquiring corpora-

tion. Moreover, a divestiture order, unlike a narrow cease and desist order, is not subject to evasion. The Commission's Section 7 enforcement powers would thus not be frustrated by the requirement that it issue a new complaint and determine the lawfulness of any future acquisition in a new proceeding.

(2) Respondent also suggests that the Commission's remedial powers were broadened in 1950 to include the power to enjoin future acquisitions (Br. in Opp. 7-8). This interpretation of the 1950 Clayton Act amendments cannot be sustained. First, as pointed out in the petition (p. 11, n. 8), the only part of the amendments dealing with the agency's remedial powers was the provision extending the Commission's divestiture power to embrace assets as well as stock. The amendments make no mention of any remedies in addition to divestiture. Secondly, the Commission itself did not assert the power to enjoin future acquisitions until 1963—thirteen years after those amendments.

Beyond this, in 1956, the Commission asked Congress to give it the very power it now claims it was given in 1950. Thus, the agency proposed that Section 11 be amended as follows:

> Insert the following italicized language into the present second paragraph of section 11:
>
> '* * * and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held *or take such other or additional steps as are necessary to restore competition* or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within

the time fixed by said order.' [*Hearings on H. R. 6748, H. R. 7229 and H. R. 8332 Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., 30-31 (1956).]

In the committee hearings on this proposed amendment, former Chairman Gwynne, speaking for the entire Commission, testified that the above italicized language should be inserted in Section 11 because the Commission is "restricted now to an order of divestiture." *Id.* at 35-36.

(3) Finally, respondent relies upon "the rationale" of this Court's holding in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966) (Br. in Opp. 8). The *Dean Foods* decision dealt with the agency's power to seek preliminary relief after issuance of an administrative complaint, but before final agency disposition of the matter. The agency's final remedial powers were not in issue. Insofar as *Dean Foods* has any relevance to the question in the instant case, it undermines respondent's assertion that power to enjoin future acquisitions is essential to fulfill its statutory responsibilities. For, under the *Dean Foods* holding, respondent can seek a preliminary injunction against an impending acquisition of stock or assets. The relationship between this power and the power to ban future acquisitions was recognized by Chairman Gwynne during the committee hearings discussed above. He testified that the amendment to Section 11 proposed by the Commission "wouldn't be so important if we had an adequate injunction provision to maintain the status quo." *Hearings on H. R. 6748, etc., supra* at 35.

The Commission, in short, was not granted and does not need power to prohibit future acquisitions.

(4) Abex's second question concerns the legal standard employed by the Federal Trade Commission in reviewing the evidence in this case (Pet. 2-3). The petition fully answers the Commission's contentions with respect to this question (see Pet. 9-10, 14-18).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EARL W. KINTNER
RALPH S. CUNNINGHAM, JR.
MARK R. JOELSON
JACK L. LAHR
GEORGE R. KUCIK
JAMES P. MERCURIO
EUGENE J. MEIGHER
1100 Federal Bar Building
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:

CARSON M. GLASS
815 Connecticut Ave., N. W.
Washington, D. C. 20006

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